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7 **UNITED STATES DISTRICT COURT**
8 **EASTERN DISTRICT OF WASHINGTON**

9 STATE OF WASHINGTON,
10
11 Plaintiff,

12 v.

13 SPENCER ABRAHAM, Secretary
14 of Energy, et al.,
15 Defendants.

NO. CT-03-5018-AAM

**MEMORANDUM IN SUPPORT
OF STATE'S MOTION TO
AMEND COMPLAINT FOR
DECLARATORY AND
INJUNCTIVE RELIEF**

16 COLUMBIA RIVERKEEPER, et al.,
17
18 Plaintiff,

19 v.

20 SPENCER ABRAHAM, Secretary
21 of Energy, et al.,
22 Defendants.

NO. CT-03-5044-AAM

consolidated

1 Decision for the Solid Waste Program, Hanford Site, Richland, WA: Storage and
2 Treatment of Low-Level Waste and Mixed Low-Level Waste, and Storage,
3 Processing, and Certification of Transuranic Waste for Shipment to the Waste
4 Isolation Pilot Plant.” This ROD announces DOE’s decision to ship low-level
5 waste (LLW) and mixed low-level waste (MLLW) to Hanford, identifies
6 treatment, storage, and disposal decisions for that waste, and identifies decisions
7 relating to the storage, processing, and certification of transuranic waste for
8 shipment to the Waste Isolation Pilot Plant (WIPP) in New Mexico. This ROD is
9 based upon the HSW EIS.

10 The second ROD DOE issued on June 23, 2004, was a revision to the
11 September 6, 2002 “Record of Decision for the Department of Energy’s Waste
12 Management Program: Treatment and Storage of Transuranic Waste” that
13 spawned this litigation. In this “revision,” DOE bases completion of its
14 remaining (suspended) shipments of transuranic waste to Hanford from the
15 Battelle West Jefferson Site (Battelle) upon issuance of the HSW EIS. DOE
16 indicates it will transfer such wastes “once the preliminary injunction issued by
17 the U.S. District Court for the Eastern District of Washington is lifted.”

18 The State now moves to amend its Complaint to challenge the adequacy of
19 NEPA environmental review supporting these RODs. The State also seeks to
20 amend its Third Cause of Action: Violation of Washington’s Hazardous Waste
21 Management Act, as discussed below.

1 A key issue that arose in the preliminary injunction briefing on this cause
2 of action was the scope of state regulatory authority over transuranic mixed
3 wastes. As represented to the Court in the Parties' November 21, 2003, Status
4 Report, the State and DOE were previously engaged in three other pieces of
5 litigation that raised questions concerning transuranic mixed waste. As part of the
6 settlement of these other matters, Ecology agreed to seek to amend its Complaint
7 in this case, to more expressly raise the authority issues concerning transuranic
8 mixed waste already at Hanford. Per the Parties' agreement, such amendment
9 would be apart from any amendment that Ecology might seek as a result of
10 issuance of the HSW EIS.

11 II. ARGUMENT

12 The State of Washington asks this Court to grant it leave to amend its
13 complaint for declaratory and injunctive relief. Motions to amend pleadings are
14 addressed by Federal Rule of Civil Procedure 15(a):

15 A party may amend the party's pleading once as a matter of course at
16 any time before a responsive pleading is served or, if the pleading is
17 one to which no responsive pleading is permitted and the action has
18 not been placed upon the trial calendar, the party may so amend it at
19 any time within 20 days after it is served. *Otherwise a party may*
20 *amend the party's pleading only by leave of court or by written*
21 *consent of the adverse party; and leave shall be freely given when*
22 *justice so requires.* A party shall plead in response to an amended
pleading within the time remaining for response to the original
pleading or within 10 days after service of the amended pleading,
whichever period may be the longer, unless the court otherwise
orders.

(Emphasis added.)

1 Because more than 20 days have passed since service of the original
2 complaint, the State seeks leave of the court to amend the complaint.

3 Rule 15(a)'s policy of freely granting leave to amend is to be applied
4 extremely liberally. *Eminence Capital, LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1051
5 (9th Cir. 2003). This liberality in granting leave to amend is not dependent on
6 whether the amendment will add causes of action or parties. *DCD Programs,*
7 *Ltd. v. Leighton*, 833 F.2d 183, 186 (9th Cir. 1987). In exercising its discretion,
8 "a court must be guided by the underlying purpose of Rule 15 – to facilitate
9 decision on the merits rather than on the pleadings or technicalities." *United*
10 *States v. Webb*, 655 F.2d 977, 979 (9th Cir. 1981).

11 In *Foman v. Davis*, 371 U.S. 178 (1962), the Supreme Court held that leave
12 to amend should be freely given in the absence of any apparent or declared
13 reasons. The Court offered multiple factors a district court should consider in
14 deciding whether to grant leave to amend, including:

15 [U]ndue delay, bad faith or dilatory motive on the part of the
16 movant, repeated failure to cure deficiencies by amendments
17 previously allowed, undue prejudice to the opposing party by virtue
of allowance of the amendment, futility of amendment.

18 *Id.* at 182.

19 The Ninth Circuit rule allows amendments to pleading absent a showing of
20 the *Foman* factors. *Yakima Indian Nation v. State of Wash. Dep't of Revenue*,
21 176 F.3d 1241 (9th Cir. 1999). Not all of the *Foman* factors merit equal weight.
22 *Eminence Capital*, 316 F.3d at 1052. The consideration of prejudice to the

1 opposing party carries the greatest weight, *Id.* at 1051, and the party opposing the
2 amendment bears the burden of showing prejudice. *DCD Programs*, 833 F.2d at
3 186-87.

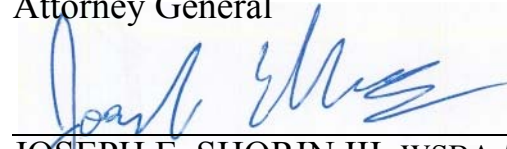
4 Absent prejudice, or a strong showing of any of the remaining *Foman*
5 factors, there exists a presumption under Rule 15(a) in favor of granting leave to
6 amend. *Eminence Capital*, 316 F.3d at 1052. Delay, by itself, is insufficient to
7 justify denial of leave to amend. *DCD Programs*, 833 F.2d at 186.

8 The standard under 15(a) is clearly met here because none of the *Foman*
9 factors are present. This is the first amendment to the pleadings proposed by
10 either party, and the State cannot be said to be acting in bad faith. This suit is still
11 in its early stages. Nor is DOE prejudiced by the State's proposed amendment.
12 Rather, the amendment allows the parties to fully litigate all issues related to
13 offsite waste.

14 The State therefore respectfully asks this Court to grant the State's Motion
15 to Amend Complaint for Declaratory and Injunctive Relief.

16 DATED this 19th day of July, 2004.

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